In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

We believe that two points raised by the briefs in opposition require reply.

1. Respondents, particularly Dean, argue (Dean Br. in Opp. 2, 8–13; Bowfund Br. in Opp. 19–22) that certiorari should be denied on the ground that the Federal Trade Commission's position on the merits of its request to the court of appeals for a preliminary injunction is unlikely to prevail. But the court of appeals held solely that it did not have jurisdiction to grant the relief requested by the Commission. It

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did not reach or determine, or intimate any view on,[1] the merits of the Commission's request. In arguing the merits here, respondents are asking this Court to dispose of the petition for certiorari by resolving in their favor a question not passed on below. Moreover, that question is one peculiarly within the lower court's discretion—the appropriateness, under equitable principles, of an order preserving the *status quo* pending completion of an administrative proceeding.

There is no warrant for such a departure from the normal practice of this Court. The jurisdictional question in this case (the only issue properly before this Court) is of course not moot, hypothetical, or abstract merely because it is possible that, should this Court reverse the court of appeals' judgment, that court may dismiss the Commission's petition on the merits. And respondents' assertion—assuming it were relevant—that the Commission's request for preliminary relief is without any merit rests upon a wholly one-sided presentation of the facts and completely ignores the fact that the lower court, in deciding whether the circumstances merited the preliminary relief sought by the Commission, would also have to consider the evidence presented in the lower court by

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[1] The court of appeals' action in dissolving the temporary restraining order at the same time that it dismissed the Commission's request for relief does not indicate that the court thought the Commission's case for preliminary relief without merit. Since the court had found that it lacked jurisdiction of the matter, it may have believed that it also lacked power to prevent the respondents from consummating the merger—the temporary restraining order being indistinguishable in effect from the preliminary injunction that the court thought it had no power to issue.

the Commission. Assuming, as we believe, that the lower court erred in holding that it lacked power to entertain the Commission's request, surely that court should have an opportunity to consider the Commission's request on the merits.

2. Respondents assert (Dean Br. in Opp. 22; Bowfund Br. in Opp. 10) that the government's jurisdictional argument is based in part on the ground of the convenience of the two government agencies (the Trade Commission and the Department of Justice) concurrently responsible for enforcing the merger law. Much more is at stake. As we shall develop more fully in our brief on the merits (if certiorari is granted), the legislative history of the merger law shows that Congress intended the Federal Trade Commission to play an equal, and not a subordinate, enforcement role. Surely the allocation of work between the administrative agency and the executive department having concurrent enforcement jurisdiction should be determined on the basis of which body is better informed on a particular merger problem—not which one may obtain a preliminary injunction. A merger case that in view of the respective knowledge and concerns of the Department and the Commission ought to remain with the Commission should not have to be shunted to the Department of Justice for the extraneous reason that a preliminary injunction seems necessary for effective relief. Thus the question whether the Commission can obtain preliminary relief in appropriate cases is no matter of the mere con-

venience of the agencies involved, but goes to the heart of a workable and efficient dual jurisdiction in the merger area.

Respectfully submitted.

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Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

FEBRUARY 1966.

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